ESTTA Tracking number: **ESTTA470589**

Filing date: **05/03/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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Date	05/03/2012
Attachments	MTS1.pdf (15 pages)(1131533 bytes) MTS2.pdf (15 pages)(1117850 bytes) MTS3.pdf (15 pages)(1086117 bytes) MTS4.pdf (15 pages)(1044414 bytes) MTS5.pdf (16 pages)(1201601 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PROMARK BRANDS INC., and H. J. HEINZ COMPANY,	)	**Opposition Nos. 91194974 and 91196358 (consolidated)**
Opposers,	)	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
vs.	)	
GFA BRANDS, INC.,	)	
Applicant.	)	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010

OPPOSER'S MOTION TO STRIKE PHILIP JOHNSON'S EXPERT REPORT ENTITLED. "A STUDY OF LIKELIHOOD OF CONFUSION"

I. INTRODUCTION

Calling a report a "rebuttal", does not make it so.

Here, GFA Brands, Inc. ("GFA") made a strategic decision not to file an Expert Disclosure and Report to support its case-in-chief. Survey experts are not required in Board proceedings, and GFA could have elected not to utilize such an expert. Instead GFA delayed complying with its obligations for many months and that prolonged delay and failure to comply with the deadlines set by the Board is the basis of this Motion to Strike.

GFA hedged its bets, and waited to see what Opposers would do. Once Promark Brands Inc. and H.J. Heinz Company (collectively, "Heinz") timely filed a survey expert report from Heinz's expert, Dr. Barry Sabol ("Sabol Report"), GFA took two actions: (1) it retained Leon B.

Kaplan to provide a critique of the Sabol Report; [1] and (2) it subsequently retained Philip Johnson in March 2012 and disclosed him as a survey expert in May 2012.

Only one of those two actions constitutes proper rebuttal. It is obvious that the Kaplan Report is a proper rebuttal expert report. The Johnson Report, however, is not. Indeed, Mr. Johnson conducted an independent survey on behalf of GFA that GFA should have conducted months earlier if GFA wanted to offer an opening, affirmative expert report to support its position in this consolidated opposition proceeding. The Board should not allow GFA to turn a supplemental report into a rebuttal report, by slapping the word "rebuttal" on this untimely disclosure. Moreover, such gamesmanship should not be rewarded.[2]

This Motion is not about semantics. By labeling the Johnson Report a "rebuttal report", not only has GFA unfairly gamed the system by gaining additional time to prepare its own survey after Heinz's survey was fully disclosed to GFA, but also GFA's tactics have effectively precluded Heinz from submitting a proper rebuttal to the Johnson Report, even though the Johnson Report, just like Heinz's Sabol Report, offers survey evidence that should be subject to critique and review. That is precisely the reason why the Board requires initial reports to be produced by a date certain, and then affords thirty days to prepare a rebuttal, as warranted.

What makes GFA's actions even more galling is that GFA represented to the Board, in requesting nearly four months to prepare the Johnson Report, that the Johnson Report would be a rebuttal report. Review of the Johnson Report, however, demonstrates that it never was intended to be a rebuttal. For all of these reasons, Philip Johnson's report should be stricken and he

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[1] The Kaplan Report is not the subject of this Motion to Strike, as the Kaplan Report is a rebuttal report that comments on and critiques the Sabol Report.

[2] GFA will likely claim that not allowing it to use the Johnson Report in these proceedings is prejudicial, and will reference the amount of resources expended on preparing the survey report. However, the Board should bear in mind that GFA tried to have it both ways – if Heinz elected not to conduct a survey, GFA would have saved itself from expending resources on an expert. The Board's rules are precisely designed to avoid this type of scenario and these perverse incentives by requiring simultaneous disclosure of experts.

should be precluded from offering testimony in these proceedings. GFA has already provided a rebuttal critique by Dr. Kaplan, and thus will suffer no prejudice from striking the Johnson Report. Heinz, however, will be severely prejudiced if GFA is permitted to circumvent the procedural rules of this Board by treating the Johnson Report as if it is fair rebuttal to the Sabol Report.

II. FACTUAL BACKGROUND

Opposition Number 91194974 was originally filed on May 20, 2010, and was eventually consolidated with Opposition Number 91196358 filed on September 2, 2010. Even though the original schedule set in the first-filed opposition indicated that discovery would close on January 25, 2011, discovery was still ongoing in these proceedings a year after that original deadline, as the result of several extensions. Nonetheless, discovery was nearing its conclusion in early 2012, and expert disclosures were due in early January. On January 9, 2012, Heinz disclosed Dr. Barry Sabol as its expert, and served Dr. Sabol's expert report on GFA in compliance with the Board's deadline for expert disclosures. GFA elected to not serve any expert disclosure. By operation of the TTAB rules, a rebuttal expert disclosure and report, if any, is due within 30 days of the filing of an expert disclosure.

On February 3, 2012, GFA requested an extension of the rebuttal expert disclosure deadline and the discovery deadline, which at that time was set to close on February 7, 2012. Heinz agreed to a 30 day extension. A stipulation was filed with the Board to that effect and a 30 day stay was granted. Two days after the Board granted the stay, on February 8, 2012, the Board, in response to a separate notification of Heinz's January 2012 expert disclosure of Dr. Sabol, independently issued an order staying the proceedings "for the taking of expert discovery",

and indicated that proceedings would resume on March 2, 2012, with discovery re-set to close on March 9, 2012.

On February 28, 2012, with only days remaining until the proceedings resumed and with discovery set to close in a mere ten calendar days, GFA indicated that it would not be able to provide its rebuttal expert disclosure until May 1, 2012, and sought Heinz's approval for this *additional* extended stay. Heinz refused to consent to such an extension. Both Heinz and GFA filed motions to resolve the dispute over the timing of expert disclosures by GFA.

Thereafter on March 16, 2012, the Interlocutory Attorney heard argument on the pending motions. During the discussion, GFA "advised that it [wa]s now prepared to disclose its first testifying expert and this expert's critique." *See* Exhibit 1, March 16, 2012 Order at 2. Later that morning, GFA disclosed the Kaplan Report to Heinz, which was dated March 12, 2012.

GFA, however, went on to indicate that it needed more time to complete a second rebuttal report from another expert. GFA then described the general contours of what that second expert would be doing and what the report was expected to contain. Upon hearing the general description, Heinz stated at that time that the proposed second report did not sound like a rebuttal report, but rather, appeared to be a new survey, wholly independent of the Sabol Report.

The Johnson Report was finally provided to Heinz on Saturday April 28, 2012, and in no way does it constitute a rebuttal report. The Johnson Report, entitled, "A Study of Likelihood of Confusion", is a brand-new, independent survey that has nothing to do with rebutting the Sabol Report submitted by Heinz five months earlier in January 2012. Indeed, a review of the Johnson Report demonstrates:

- Mr. Johnson was not asked to prepare a rebuttal report and survey. Paragraph 5 of the Johnson Report provides, "Counsel asked whether I could design and

conduct a study that would measure the extent, if any, to which the Smart Balance name that had been objected to by ProMark, is or is not likely to cause confusion when relevant consumers are exposed to it in connection with frozen meal products. I agreed and proceeded to design and conduct such a study." *See* Exhibit 2, ¶ 5.

- Mr. Johnson never discusses, let alone mentions or references, the Sabol Report, as would be expected if this were a rebuttal report.
- Mr. Johnson never characterizes his report as a rebuttal.

III. GFA IGNORES THE BOARD'S RULES ON EXPERT DISCLOSURE

Trademark Rule 2.120(a)(2) provides that "[d]isclosure of expert testimony ***must*** occur in the ***manner and sequence*** provided in Federal Rule of Civil Procedure 26(a)(2)..." (emphasis added). The entire rationale of requiring disclosures followed by rebuttal disclosures is to avoid the use of "rebuttal" expert to introduce evidence more properly part of a party's case-in-chief. All parties have the option of introducing expert testimony, and are supposed to exchange such information simultaneously. The Board sets a scheduling order, and the parties are expected to follow the Board's rules and orders. *See generally, DC Comics and Marvel Characters, Inc. v. Philip Frederick Margo & Noah Margo*, 68 U.S.P.Q.2d 1319 (2003) ("Strict compliance with the applicable rules is expected of all parties before the Board..."); *Itote Inc. v. Totes Isotoner Corp.*, Opp. No. 121,054, 2001 WL 1587072, at *2 (Dec. 7, 2001) ("[S]trict compliance with the Trademark Rules and all other applicable rules is expected of all parties ... It is the responsibility of a party, even those parties representing themselves, to timely review and respond to motions filed by opposing counsel, to keep track of filing deadlines, and to take steps to secure a timely extension of those deadlines. Opposer is advised that noncompliance with the

Board Rules of Practice will be looked on with extreme disfavor by the Board.") (attached hereto as Exhibit 3). Here, GFA is getting two bites at the apple – having missed the first expert disclosure deadline, it is packaging the same information it should have submitted in January 2012 as rebuttal testimony, and is now submitting it in May 2012. GFA was able to defer the decision of whether to retain a survey expert and expend resources until after it saw what Heinz had done. This is even more apparent in that GFA has retained two experts – Dr. Kaplan (who actually provided a rebuttal report to the Sabol Report) and Mr. Johnson (who prepared and submitted the independent, affirmative survey that had nothing to do with the Sabol Report, whatsoever). That is not the way the simultaneous disclosure is intended to function.

IV. CONCLUSION

Heinz will suffer real prejudice if GFA's rebuttal charade is permitted to stand. Without an opportunity to rebut the Johnson Report through its own proper rebuttal, Heinz has no real opportunity to challenge Mr. Johnson's findings. Moreover, permitting this report to stand establishes a precedent by which no litigant will feel compelled to abide by the Board's expert discovery schedule, as long as they attach the word "rebuttal" to whatever information they are attempting to shoehorn into the proceeding. For all of these reasons, Opposers request that the Board grant this Motion to Strike.

Dated this 3rd day of May, 2012.

Respectfully submitted,

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Attorneys for Opposers

EXHIBIT 1

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Issued: March 16, 2012

Opposition No. **91194974**
(parent)
Opposition No. 91196358

Promark Brands Inc. and H.J. Heinz Company[1]

v.

GFA Brands, Inc.

Cheryl S. Goodman, Interlocutory Attorney:

A telephone conference was convened on March 16, 2012, with respect to opposer's motion, filed March 2, 2012, to compel applicant's rebuttal expert disclosures, and applicant's motion, filed March 2, 2012, to extend time to provide rebuttal expert disclosures.[2]

Present for the telephone conference were Cecilia Dickson, counsel for opposer, and David Cross, counsel for applicant. Present for the Board was the above identified interlocutory attorney.

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[1] H.J. Heinz Company has been joined rather than substituted as a party to this proceeding because the assignment occurred after the commencement of the proceeding, and prior to trial. TBMP Section 512 (3d ed. 2011). Recorded on May 5, 2011, at the Office's Assignment Branch at Reel/Frame: 4534/0456.

[2] The parties had agreed among themselves to extend applicant's rebuttal expert disclosure deadline from February 8, 2012 to March 9, 2012; the Board suspended proceedings for expert

Applicant sought to extend time to serve its rebuttal expert disclosures to May 1, 2012, and to extend discovery to June 1, 2012; opposer sought to compel applicant's expert rebuttal disclosures no later than March 16, 2012.

Opposer argues that "the late retention [of an expert] should not prejudice Heinz" and submits that the requested extension is not reasonable. Opposer submits that Heinz "should not be required to suffer the consequences of GFA or its proposed lack of diligence in arranging for a timely rebuttal." Heinz submits that it will be prejudiced by the extension.

In its cross-motion to extend, applicant argues that it "encountered difficulties in locating a survey expert" and determined that it needed to hire two survey experts. Applicant identified the second survey expert in mid-February 2012, engaging this expert at the end of February 2012.

In the telephone conference, applicant in response to the motion to compel and in reply to the motion to extend, provided further detail regarding the need for an extension, including engaging the second expert and the planned use of the second expert and the services to be provided. Applicant advised that it is now prepared to disclose its first testifying expert and this expert's critique.

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discovery on February 8, 2012 with proceedings resuming on March

Applicant has also disclosed the name of the second expert, but advised that according to the expert, the completed report and rebuttal survey likely will not be available until May 1, 2012.

Opposer reiterated its concern regarding prejudice to opposer including the possibility that applicant could proceed to use the mark in connection with frozen foods during the extended discovery period, also pointing out that it was able to timely comply with the expert disclosure deadline and applicant should be able to do the same. Opposer also contended that based on applicant's arguments at the telephone conference, it appears that applicant is attempting to circumvent the expert disclosure deadline in seeking a rebuttal survey and that the survey critique should be sufficient rebuttal.

In response to opposer's argument regarding the rebuttal survey, applicant argued that a survey is an appropriate means of rebuttal, and that opposer's criticisms regarding the survey are premature at this point.

The standard for granting an extension of time is good cause. See Fed. R Civ. P. 6(b) and TBMP § 509 (3rd ed. rev. 2011) and authorities cited therein. The Board generally is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been

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2, 2012.

guilty of negligence or bad faith and the privilege of extensions is not abused. *See e.g., American Vitamin Products Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992).

The Board found good cause for granting the extension.

Accordingly, the motion to extend is granted, as corrected, with an adjustment with respect to the close of discovery which should be May 31, 2012, rather than June 1, 2012. In view of the granting of the motion to extend, the motion to compel is denied. However, opposer is expected to make its expert disclosures of its first expert and first expert's report (critique) within FIVE DAYS of the date of this order in view of applicant's counsel's representations that it will be using this expert as a testifying expert, and his report is now available.[3] Opposer can proceed with discovery of at least the first expert during this extended discovery/disclosure period. TBMP Section 401.03.

Dates are reset as follows:

Expert Disclosures Due	**5/1/12**
Discovery Closes	**5/31/12**
Plaintiff's Pretrial Disclosures	**7/15/12**
Plaintiff's 30-day Trial Period Ends	**8/29/12**
Defendant's Pretrial Disclosures	**9/13/12**
Defendant's 30-day Trial Period Ends	**10/28/12**
Plaintiff's Rebuttal Disclosures	**11/12/12**
Plaintiff's 15-day Rebuttal Period Ends	**12/12/12**

[3] Objections regarding the rebuttal survey are properly left for trial. The Board does not entertain motions in limine. TBMP Sections 707.01 and 527.01(f) (3d ed. 2011).

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

EXHIBIT 2

PROMARK BRANDS, INC.

(OPPOSER)

VS.

GFA BRANDS, INC.

(APPLICANT)

A STUDY OF LIKELIHOOD OF CONFUSION

April 2012

TABLE OF CONTENTS

REPORT OF PHILIP JOHNSON

I, Philip Johnson, state as follows:

I. BACKGROUND

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.

2. I have been with this firm since 1971. Over the past 41 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), the American Intellectual Property Law Association (AIPLA), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases in which I have offered survey evidence during the past four years are attached to Appendix A of this Report.

II. INTRODUCTION

3. During February 2012, I was contacted by counsel from the law firm, Quarles & Brady LLP. I was formally retained on behalf of its client, GFA Brands, Inc. ("GFA") pursuant to an engagement letter dated March 1, 2012. Counsel informed me of a dispute that has arisen between GFA and ProMark Brands Inc. ("ProMark").

4. This dispute concerns GFA's intent-to-use applications in the U.S. Patent and Trademark Office to register the term SMART BALANCE in connection with frozen meals, among other products. It is my understanding that ProMark opposes GFA's applications alleging that consumers who encounter Smart Balance frozen meal products may falsely believe that they come from or are related to Smart Ones.

5. Counsel asked whether I could design and conduct a study that would measure the extent, if any, to which the Smart Balance name that has been objected to by ProMark, is or is not likely to cause confusion when relevant consumers are exposed to it in connection with frozen meal products. I agreed and proceeded to design and conduct such a study. What follows is a report on the design, execution, results, and conclusions that one can draw from this research.

III. METHODOLOGY

6. Personal interviews were conducted between March 8 and 19, 2012 with 410[1] adults who are current or prospective purchasers of frozen meal products. These personal interviews were conducted in shopping mall-based research facilities located in 8 markets geographically distributed throughout the United States.

7. Specifically, interviewing was conducted in each of the four major U.S. Census Regions, as follows:

NORTHEAST	SOUTH	MIDWEST	WEST
New York, NY	Dallas, TX	Minneapolis, MN	Seattle, WA
Philadelphia, PA	Atlanta, GA	Chicago, IL	San Francisco, CA

8. The survey employed a "test" cell and a "control" cell. Each respondent was randomly assigned to either the test cell (i.e., viewed only the test cell exhibit) or the control cell (i.e., viewed only the control cell exhibit). One-half of the interviews were conducted in the test cell (205 cases), while the other half of the interviews were conducted in the control cell (205 cases).

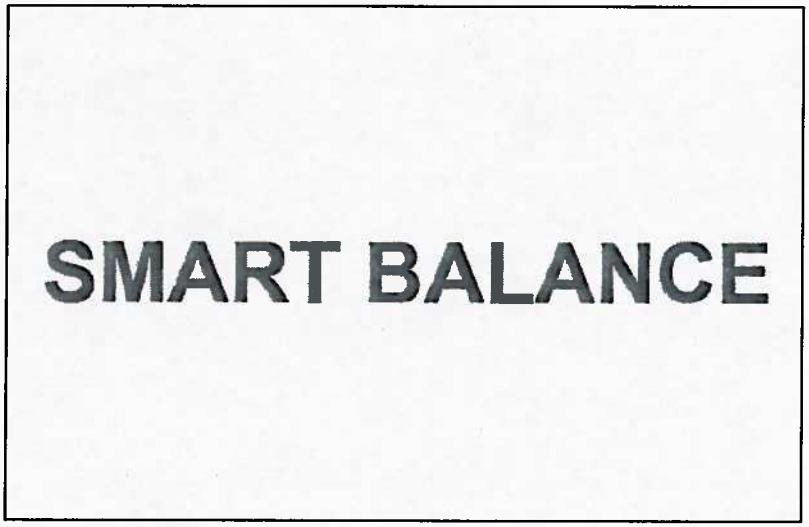
9. Test cell respondents were exposed to an exhibit card bearing the name "SMART BALANCE," while control cell respondents were exposed to an exhibit card bearing the name "RIGHT BALANCE" in all capital letters. I selected "RIGHT BALANCE" as the

[1] A total of 414 interviews were conducted. However, four of these interviews have been excluded from the database due to failure in the validation process, leaving a total of 410 qualifying interviews. ID numbers for these 4 invalid interviews are #23, #42, #311, and #333.

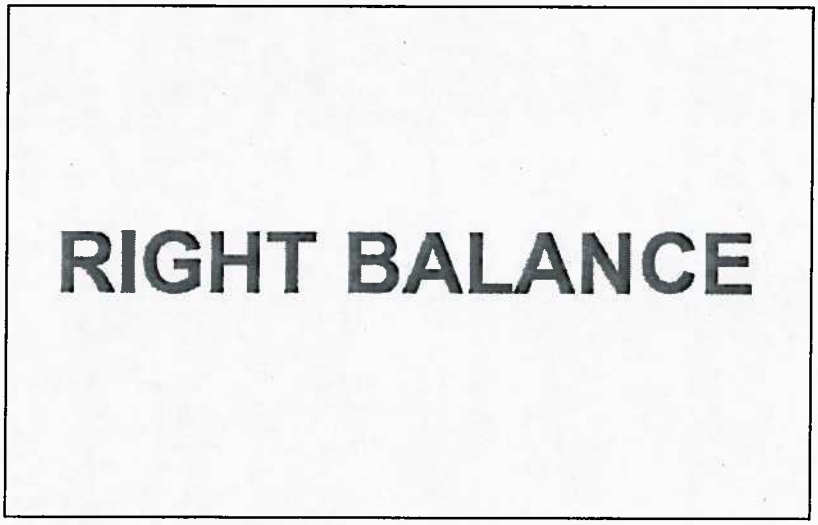
control cell name because it is similar in meaning, but does not utilize the disputed word "SMART."

10. Reduced size images of the exhibit cards are shown below:

Test Cell Exhibit



Control Cell Exhibit



11. This approach of using both a test cell and control cell is the preferred survey methodology because there is a certain amount of error in any survey measurement that can be caused by sample error, guessing, the design of the study, or the construction of the questions asked. It is important to exclude these forms of error from the study results when assessing the degree of confusion that may be present. Specifically, the methodology used in this study allows one to accurately isolate and assess the effects of the alleged infringing word mark at issue when measuring any possible likelihood of confusion. Operationally, this is accomplished by taking the proportion of test cell respondents who falsely identify Smart Ones as the source or related source when shown the Smart Balance name in connection with frozen meals and then subtracting the corresponding proportion of control cell respondents who similarly falsely identify Smart Ones as the source or related source when shown the Right Balance name in connection with frozen meals.

12. During the course of the interview, each respondent was asked who they believe is the source and whether they believe the source is related to, associated with, or has a licensing agreement with any other brands, products, or companies. In order to understand the basis for their beliefs as well as exactly what company they are referring to, respondents were then asked open-ended questions that allowed them to explain their answers in their own words and clarify each survey response.

13. This methodology follows the general pattern of the "Eveready" test, which is frequently used to measure likelihood of confusion. This design produces a very direct measure of confusion as to source or relationship.

14. In disputes about likelihood of confusion, the appropriate universe for the survey is the junior user's market. In his treatise, Dr. Thomas McCarthy states that when designing a study to measure likelihood of confusion, the proper universe is potential consumers of the junior user's goods or services:[2]

> *In a traditional case claiming "forward" confusion, not "reverse" confusion, the proper universe to survey is the potential buyers of the junior user's goods or services.*

15. In order to reach the relevant universe, interviews were conducted with current and prospective consumers of frozen meal products. Specifically, qualified respondents were adults who are responsible for all or some of the grocery shopping for their household and have either purchased frozen meals in the past month for themselves or their household or plan to purchase frozen meals for themselves or their household in the next month.

16. In order to qualify, respondents must have also met all of the following criteria:

- Must not have participated in any market research survey in the past three months.
- The respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor, or retailer of frozen food; or a store in the mall where the interviewing took place.

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[2] McCarthy, J. Thomas. McCarthy on Trademarks and Unfair Competition, Volume 5, 32:159, pg. 32-249. 2001.

- Must be wearing his/her eyeglasses or contact lenses at the time of the interview if he/she usually wears them when shopping or reading.

17. The screening interview proceeded as follows:

Question I:

"Before we begin, what is your age?"

Question II:

"RECORD GENDER FROM OBSERVATION:"

Question III:

"What proportion of the grocery shopping are you personally responsible for in your household? ***READ FIRST THREE ALTERNATIVES:***
...ALL OF IT
...SOME OF IT
...NONE
*...**IF SPONTANEOUS:** DON'T KNOW"*

Question IVa:

"Thinking about the past month, have you personally purchased... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?
...ice cream?
...frozen meals?
...frozen juice?"

Question IVb:

"Thinking about the next month, do you personally plan to purchase... (ASK FOR EACH BELOW) from a supermarket or grocery store for yourself or your household?
...ice cream?
...frozen meals?
...frozen juice?"

Question V:

"Have you participated in any market research survey in the past three months?"

Question VI:

"Do you, or does any member of your household, work for... (ASK FOR EACH)?
... a market research or advertising firm?
... a manufacturer, distributor, or retailer of frozen food?
... a store in this mall?"

Question VIIa:

"Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?"

Question VIIb:

***"IF 'YES' IN Q.VIIa, ASK:** Before continuing, would you please put them on?"*

Question VIII:

"I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out?"

18. Each screened and qualified respondent was escorted to a private room in the interviewing facility to conduct this interview.

19. Respondents were asked to be seated and then told:

"Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess."

20. Qualified respondents were then handed either the test cell exhibit or the control cell exhibit and told:

> *"**HAND RESPONDENT EXHIBIT CARD. SAY:** This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. **RECORD ANY SPONTANEOUS COMMENTS MADE.**"*

21. Once the respondent was done looking at the exhibit, the interviewer was instructed to take it away and put it out of sight for the remainder of the interview.

22. The exact questions used in the interview, and the sequence in which they occurred are as follows:

> *Question 2a:*
>
> *"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"*
>
> *Question 2b:*
>
> *"What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*
>
> *Question 3a:*
>
> *"What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

Question 3b:

*"**ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*

Question 4a:

*"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE:** Any others?"*

Question 4b:

*"**ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a:** What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? **PROBE:** Anything else?"*

23. Finally, classification information was secured and the interview completed. Copies of the questionnaire, interviewing instructions, and exhibits used are attached to Appendix B of this Report.

24. Based on the sample size of 205 cases per cell, the statistical error rate for the key measures in this study falls into the range of ±4.1% for a statistic such as 10% at the 95% confidence level. In other words, one would expect that 95 times out of 100, a measurement that was actually 10%, would accurately be represented in the data by a statistic as high as 14.1%, or as low as 5.9%.

25. Interviewing was administered and supervised, under my direction, by Survey Center, L.L.C., a company that specializes in the administration of market research surveys. Survey Center is the data collection division of Leo J. Shapiro and Associates and is a member of the Market Research Association. Interviewing in each market was conducted by independent research firms who specialize in personal interviewing in shopping malls. Interviewers in each market were trained in proper interviewing techniques and were briefed specifically on this project.

26. The survey used a "double-blind" approach, where neither the respondent nor the interviewers conducting the study were aware of the purpose of the research or the identity of the party who commissioned it. The methodology, survey design, execution, and reporting were all conducted in accordance with generally accepted standards of objective procedure and survey technique.

27. Independent validation was conducted by telephone, which involved re-establishing contact with the persons who were interviewed in the study. Based on this re-contact, overall, four of the 414 interviews failed during the validation procedure, leaving a total of 410 qualifying interviews. These four interviews have been excluded from the study sample, and there is no significant change in any of the study results based on this exclusion. A detailed summary of the survey validation is attached to Appendix C of this Report.

28. The work performed to design, carry out, and report this study is covered by a billing of $100,000. Additional time required for trial testimony or deposition, will be billed at a rate of $7,000 per day, plus expenses.

IV. RESULTS

Source Question

29. Only 1% of test cell respondents (i.e., 2 individuals) report the false belief that Smart Ones is the source of a frozen meal product called Smart Balance. None of the control cell respondents name Smart Ones in response to this question.

Question 2a:

"Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?"

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
All Who Have A Belief About Source:	27%	28%
Smart Balance	4	*
Lean Cuisine	3	5
Weight Watchers	3	5
Healthy Choice	3	3
Stouffer's/Corner Bistro	2	1
Name Frozen Food Products	1	--
Smart Ones	**1**	--
Banquet	*	2
Jenny Craig	*	1
Tyson	--	2
Right Balance	--	1
Other**	7	7
Don't Have A Belief About Source:	73	72

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Related Products or Brands Question

30. In addition, there is one test cell respondent (0.5%) who reports the false belief that Smart Ones is a related product or brand. None of the control cell respondents name Smart Ones in response to this question.

Question 3a:

"What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? ***PROBE:*** *Any others?"*

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
All Who Have a Belief About Related Products/Brands:	18%	13%
Grocery Products	5	1
Smart Balance Products (e.g., milk, butter, eggs, mayo, peanut butter, etc.)	5	1
Lean Cuisine	2	2
Stouffer's/Corner Bistro	2	2
Frozen Meals	2	1
Frozen Food Products	2	--
Healthy Choice	1	1
South Beach Diet	1	*
Weight Watchers	*	2
Smart Choice	*	1
Smart Ones	*	--
Banquet	--	2
Other**	3	4
Don't Have A Belief About Related Products/Brands:	82	87

* 0.5% or fewer mentions.

** Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Relationship Question

31. Finally, one test cell respondent (0.5%) reports the false belief that Smart Balance is related to, associated with, or is licensed by Smart Ones. None of the control cell respondents name Smart Ones in response to this question.

Question 4a:

"What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? ***PROBE:*** *Any others?"*

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
All Who Have a Belief About Related Source:	13%	9%
Weight Watchers	3	1
Lean Cuisine	2	2
Healthy Choice	2	1
Jenny Craig	1	*
Kraft	1	*
Hungry Man	1	*
Special K	1	--
Swanson	*	*
Dannon/Activia	*	*
Smart Ones	*	--
Smart Balance	--	*
Other**	4	4
Don't Have A Belief About Related Source:	87	91

* 0.5% or fewer mentions.

**Net of single mentions.

NOTE: Table may sum to more than total due to multiple mentions by some respondents.

Confusion Summary Table for "Smart Ones"

32. When the results to all survey questions relating to source, related products/brands, and relationship are considered together on an unduplicated basis, just 2% of test cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. This 2% statistic is below the standard error rate for the survey (±4.1%) such that it is not significant. None of the control cell respondents report the false belief that Smart Ones is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals.

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
Total "Smart Ones" Identification (Net):	**2%**	**–%**
In Source Question	1	--
In Related Products/Brands, But Not Source Question	*	--
In Relationship, But Not Source or Related Products/Brands Questions	*	--
Adjusted Findings		
Adjusted Net of Test – Control	**2%** -	**0%** = **2%**

* 0.5% or fewer mentions.

33. When asked to explain the reasons for their belief, those test cell respondents (n=4) who report the false belief that Smart Ones is the source or a related source of a frozen meal called Smart Balance give the following reasons:

Question 2b/3b/4b:

"What makes you say that?"

ID 00231
Source Qstn: Smart Ones. Because they make diet food and it has "smart" in the name.

ID 00413
Spontaneous Comments: It resembles the name Smart Ones.
Source Qstn: Smart Ones. Because of the similarity of the names.

ID 00083
Related Products Qstn: Smart Ones. How it was displayed.

ID 00100
Relationship Qstn: Smart Ones. I saw it at the store. It just had the name Smart Balance on there. They make the best quality dinners for Smart Ones if you want to lose weight. Really good stuff.

"Weight Watchers" Analysis

34. It is my understanding that the Weight Watchers brand is also present on most, if not all, of the Smart Ones products. Given this dispute, it is prudent to consider whether Weight Watchers mentions significantly vary when comparing test cell and control cell results. It is also important to consider whether these Weight Watchers mentions are based in any way on consumer knowledge of the Smart Ones brand.

35. When the results to all survey questions are considered together on an unduplicated basis, just 6% of test cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Smart Balance name in connection with frozen meals. Similarly, 7% of control cell respondents report the false belief that Weight Watchers is the source or a related source when they are exposed to the Right Balance name in connection with frozen meals. When the control cell result is subtracted from the test cell result, it yields a zero result (6% - 7% = -1%).

	EXHIBIT SHOWN	
	SMART BALANCE	RIGHT BALANCE
	(205)	(205)
ALL RESPONDENTS	100%	100%
Total "Weight Watchers" Identification (Net):	**6%**	**7%**
In Source Question	3	5
In Related Products/Brands, But Not Source Question	*	1
In Relationship, But Not Source or Related Products/Brands Questions	3	1
Adjusted Findings		
Adjusted Net of Test – Control	**6%**	**7%**

6% - 7% = 0% (-1%)

* 0.5% or fewer mentions.

36. Hence, there is no significant difference between the test cell and the control cell for Weight Watchers mentions. Further, the Weight Watchers mentions that occur are not related to the names at issue (i.e., Smart Balance and Smart Ones), but generally reflect the similarity in health and diet-conscious product offerings from Smart Balance and Weight Watchers.[3]

37. In fact, respondents name other frozen meal brands who compete with Weight Watchers in this genre at a similar level that they name Weight Watchers (e.g., Lean Cuisine mentioned by 7% test cell respondents and 10% control cell respondents; Healthy Choice mentioned by 6% test cell respondents and 5% control cell respondents).

[3] Verbatim comments for respondents who identify Weight Watchers are attached to Appendix D of this Report.

V. CONCLUSIONS AND OPINIONS

38. Based on the results of this research, when current or prospective purchasers of frozen meals are exposed to the Smart Balance word mark in connection with frozen meals, there is no significant likelihood of confusion that these consumers will falsely believe this frozen meal comes from or is related to Smart Ones.

39. Moreover, even when considering Weight Watchers mentions, rather than the Smart Ones mark at issue, there is no likelihood of confusion.

40. Overall, it is my opinion that GFA's use of the Smart Balance name in connection with frozen meals causes no likelihood of confusion with Smart Ones frozen meals.

Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 26, 2012 at Chicago, Illinois.

Philip Johnson

APPENDIX A

- Philip Johnson Curriculum Vitae
- Recent Cases In Which Philip Johnson Has Testified

PHILIP JOHNSON

CURRICULUM VITAE

Philip Johnson is the Chief Executive Officer of Leo J. Shapiro and Associates, a Chicago-based market research and behavioral consulting company. Mr. Johnson has been with this firm since 1971 and has held a number of positions. In recent years, he has concentrated his efforts in the areas of study design and the development of innovative research techniques.

Over the past years, Mr. Johnson has designed and supervised hundreds of surveys measuring consumer behavior and opinion, employing a wide range of research techniques. His area of expertise is in the use of survey research as a tool in litigation, including jury selection and trademark disputes.

Mr. Johnson has offered testimony regarding survey evidence on over fifty occasions in both Federal and State courts. In addition, he has offered survey research in matters before the Federal Trade Commission, The Food and Drug Administration, the Patent and Trademark Office, and the Trademark Trial and Appeal Board. Mr. Johnson has designed, conducted, and reported survey evidence on behalf of both plaintiffs and defendants in various cases. The topics covered in these litigation related surveys include matters related to likelihood of confusion, secondary meaning, genericness, dilution, false advertising, change of venue, and unfair competition.

Part of Mr. Johnson's training has been through working with Dr. Leo J. Shapiro, the Founder of the company; the late Dr. Philip M. Hauser, a former Director of the U. S. Census Bureau; and the late

Dr. Hans Zeisel, who made significant contributions in the application of social science to the solution of legal questions.

Mr. Johnson has given lectures before the American Bar Association (ABA) and the Practising Law Institute (PLI) on the use of survey research in litigation. He is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Mr. Johnson has a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago.

RECENT CASES IN WHICH PHILIP JOHNSON HAS TESTIFIED OR OFFERED SURVEY EVIDENCE AT TRIAL...

NOVEMBER 2009	FAIR ISAAC CORPORATION v. EQUIFAX, INC., ET AL. United States District Court for the District of Minnesota Secondary Meaning
JULY 2009	THE SCOTTS COMPANY LLC v. CENTRAL GARDEN & PET COMPANY AND GULFSTREAM HOME & GARDEN, INC., United States District Court for the Southern District of Ohio False Advertising
JULY 2009	LUMBER LIQUIDATORS, INC., v. STONE MOUNTAIN CARPET MILLS, INC. d/b/a THE FLOOR TRADER United States District Court for the Eastern District of Virginia Likelihood of Confusion
NOVEMBER 2008	BRIGHTON COLLECTIBLES, INC. v. COLDWATER CREEK, INC. United States District Court for the Southern District of California Secondary Meaning
OCTOBER 2008	EL DIABLO, INC. v. MEL-OPP & GRIFF, LLC., ET AL. In the Superior Court of the State of Washington in and for the County of King Trade Dress Infringement
AUGUST 2008	EXPERIENCE HENDRIX, LLC. AND AUTHENTIC HENDRIX, LLC., v. ELECTRIC HENDRIX, LLC., ET AL. United States District Court for the Western District of Washington at Seattle Likelihood of Confusion
JANUARY 2008	PEDINOL PHARMACAL, INC. v. RISING PHARMACEUTICALS, INC. United States District Court for the Eastern District of New York Therapeutic Equivalence

NOVEMBER 2007	SKECHERS U.S.A., INC. v. VANS, INC. United States District Court for the Central District of California Likelihood of Post-Sale Confusion
AUGUST 2007	SAINT-GOBAIN CORPORATION v. 3M COMPANY United States Patent and Trademark Office Trademark Trial and Appeal Board Secondary Meaning
APRIL 2007	NIKE, INC. v. NIKEPAL INTERNATIONAL, INC. United States District Court for the Eastern District of California Likelihood of Initial Interest Confusion and Dilution
FEBRUARY 2007	JOHNSON & JOHNSON VISION CARE, INC. v. CIBA VISION CORPORATION United States District Court for the Southern District of New York False Advertising
NOVEMBER 2006	HASBRO, INC. v. MGA ENTERTAINMENT, INC. United States District Court for the District of Rhode Island Secondary Meaning
OCTOBER 2006	CLASSIC FOODS INTERNATIONAL CORPORATION v. KETTLE FOODS, INC. United States District Court for the Central District of California (Southern Division) Likelihood of Confusion
JUNE 2006	GROCERY OUTLET INC. v. ALBERTSON'S, INC., AMERICAN STORES COMPANY, L.L.C., AND LUCKY STORES, INC. United States District Court for the Northern District of California (San Francisco Division) Likelihood of Confusion and Fame
JUNE 2006	DE BEERS LV TRADEMARK LTD. AND DE BEERS LV LTD. v. DEBEERS DIAMOND SYNDICATE INC. AND MARVIN ROSENBLATT United States District Court for the Southern District of New York Awareness
APRIL 2006	24 HOUR FITNESS USA, INC. v. 24/7 TRIBECA FITNESS, L.L.C., 24/7 GYM, L.L.C., ET AL. United States District Court for the Southern District of New York Likelihood of Confusion

APRIL 2006	JUICY COUTURE, INC. AND L.C. LICENSING, INC. v. LANCÔME PARFUMS ET BEAUTE & CIE AND LUXURY PRODUCTS, L.L.C. United States District Court for the Southern District of New York Likelihood of Confusion
JANUARY 2006	WHIRLPOOL PROPERTIES, INC., ET AL., v. LG ELECTRONICS U.S.A., INC., ET AL. United States District Court for the Western District of Michigan (Southern Division) Likelihood of Confusion
OCTOBER 2005	PRL USA HOLDINGS, INC. v. UNITED STATES POLO ASSOCIATION, ET AL. United States District Court for the Southern District of New York Likelihood of Confusion
SEPTEMBER 2005	HILL'S PET NUTRITION, INC. v. NUTRO PRODUCTS, INC. AND JOHN DOES #1-20 United States District Court for the Central District of California (Western Division) False Advertising
SEPTEMBER 2005	PERFUMEBAY.COM, INC. v. EBAY, INC. United States District Court for the Central District of California (Western Division) Likelihood of Dilution and Initial Interest Confusion
JUNE 2005	METROPOLITAN LIFE INSURANCE CORPORATION v. METBANK United States District Court for the Southern District of New York Likelihood of Confusion
MARCH 2005	PACIFIC MARKET INTERNATIONAL v. THERMOS L.L.C. United States District Court for the Western District of Washington (Seattle Division) Likelihood of Confusion
MARCH 2005	JADA TOYS, INC. v. MATTEL, INC. United States District Court for the Central District of California Likelihood of Confusion

DEPOSITION TESTIMONY OF PHILIP JOHNSON
THAT HAS NOT BEEN OFFERED AT TRIAL...

NOVEMBER 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
AUGUST 2011	MCDONALD'S CORPORATION v. MCSWEET, LLC United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
APRIL 2011	SHEETZ OF DELAWARE, INC. v. DOCTOR'S ASSOCIATES, INC. United States Patent and Trademark Office Before the Trademark Trial and Appeal Board
JANUARY 2011	TECHNOLOGY PATENTS LLC v. DEUTSCHE TELEKOM AG, ET AL United States District Court for the District of Maryland
DECEMBER 2010	BLAIN SUPPLY, INC. v. RUNNING SUPPLY, INC. United States District Court for the Western District of Wisconsin
DECEMBER 2010	LUCENT TECHNOLOGIES, INC. v. MICROSOFT CORPORATION United States District Court for the Southern District of California
JULY 2010	ROSETTA STONE LTD. v. TOPICS ENTERTAINMENT, INC. United States District Court for the Eastern District of Virginia
APRIL 2010	LA QUINTA WORLDWIDE, LLC v. QUINTA REAL PROMOCION, S.A. de C.V. United States District Court for the District of Arizona (Tucson Division)
MARCH 2010	THE NORTH FACE APPAREL CORPORATION v. THE SOUTH BUTT, LLC United States District Court for the Eastern District of Missouri (St. Louis)

MARCH 2010	THINK VILLAGE-KIWI, LLC v. ADOBE SYSTEMS, INC., AND ADOBE MACROMEDIA SOFTWARE LLC United States District Court for the Northern District of California
SEPTEMBER 2009	FLOWERS BAKERIES BRANDS, INC. v. INTERSTATE BAKERIES CORPORATION United States District Court for the Northern District of Georgia
FEBRUARY 2009	CRICKET COMMUNICATIONS, INC. v. HIPCRICKET, INC. United States District Court for the Western District of Washington
APRIL 2008	SEXY HAIR CONCEPTS, LLC v. VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC. United States District Court for the Southern District of New York
APRIL 2007	IDT TELECOM, INC. AND UNION TELECARD ALLIANCE, LLC v. CVT PREPAID SOLUTIONS, INC., ET AL. United States District Court for the District of New Jersey
NOVEMBER 2006	STATIC CONTROL COMPONENTS, INC. AND WAZANA BROTHERS INTERNATIONAL, INC. D/B/A MICRO SOLUTIONS ENTERPRISES v. LEXMARK INTERNATIONAL, INC. United States District Court for the District of Columbia

APPENDIX B

- Questionnaire
- Interviewing Instructions
- Exhibits

QUESTIONNAIRE

Hello, my name is _____. I work for Survey Center, and we are doing an opinion study. Let me assure you that we are not selling anything. This is strictly for research purposes only.

SCREEN:

I. Before we begin, what is your age? **RECORD AGE:** _____

( )UNDER 18 YEARS…**TALLY AND TERMINATE.**

( )BETWEEN 18 AND 34 YEARS…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )BETWEEN 35 AND 54 YEARS…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )55 YEARS AND OLDER…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )REFUSED…**TALLY AND TERMINATE.**

II. **RECORD GENDER FROM OBSERVATION:**

( )MALE…**CHECK SCREENING QUOTAS AND CONTINUE.**

( )FEMALE…**CHECK SCREENING QUOTAS AND CONTINUE.**

III. What proportion of the grocery shopping are you personally responsible for in your household? **READ FIRST THREE ALTERNATIVES:**

( )ALL OF IT…**CONTINUE.**

( )SOME OF IT…**CONTINUE.**

( )NONE…**TALLY AND TERMINATE.**

IF SPONTANEOUS: ( )DON'T KNOW…**TALLY AND TERMINATE.**

RESPONDENT MUST BE PERSONALLY RESPONSIBLE FOR "ALL" OR "SOME" OF THE GROCERY SHOPPING IN THEIR HOUSEHOLD IN ORDER TO QUALIFY FOR INTERVIEW; OTHERWISE, TALLY AND TERMINATE.

IVa. Thinking about the past month, have you personally purchased…**(ASK FOR EACH BELOW)** from a supermarket or grocery store for yourself or your household?

b. Thinking about the next month, do you personally plan to purchase…**(ASK FOR EACH BELOW)** from a supermarket or grocery store for yourself or your household?

	IVa. Past Month Purchase?		IVb. Next Month Purchase?	
…ice cream?	( )NO	( )YES	( )NO	( )YES
…frozen meals?	**( )NO**	**( )YES**	**( )NO**	**( )YES**
…frozen juice?	( )NO	( )YES	( )NO	( )YES

IF RESPONDENT SAYS "NO" TO PURCHASING FROZEN MEALS IN Q.IVa AND Q.IVb, TALLY AND TERMINATE. IN ORDER TO QUALIFY FOR INTERVIEW, RESPONDENT MUST HAVE EITHER PERSONALLY PURCHASED FROZEN MEALS IN THE PAST MONTH OR MUST PLAN TO PERSONALLY PURCHASE FROZEN MEALS IN THE NEXT MONTH.

V. Have you participated in any market research survey in the past three months?

( )NO…**IF NO, CONTINUE.** ( )YES…**IF YES, TALLY AND TERMINATE.**

VI. Do you, or does any member of your household, work for…(ASK FOR EACH)?

…a market research or advertising firm?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**
…a manufacturer, distributor or retailer of frozen food?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**
…a store in this mall?	( )NO	( )YES…**IF YES, TALLY AND TERMINATE.**

VIIa. Before we continue, do you usually wear eyeglasses or contact lenses when you shop or read?

( )NO…**IF NO, SKIP TO Q.VIII.** ( )YES…**IF YES, CONTINUE WITH Q.VIIb.**

b. **IF "YES" IN Q.VIIa, ASK:** Before continuing, would you please put them on?

( )NO…**IF NO, TALLY AND TERMINATE.** ( )YES…**IF YES, CONTINUE WITH Q.VIII.**

VIII. I would like to ask you a few questions in our interviewing facility. The whole process will take about five minutes of your time. Would you be willing to help us out? ( )NO…**IF NO, TALLY AND TERMINATE.** ( )YES…**IF YES, CONTINUE.**

QUESTIONNAIRE:

ESCORT RESPONDENT TO INTERVIEWING FACILITY.

SAY: Before we begin, I would like you to know that your answers and identity will be kept strictly confidential. If you don't know the answer to any of the questions, it is okay to say so. Please do not guess.

ROTATE WHICH EXHIBIT CARD IS SHOWN IN BETWEEN RESPONDENTS.

"X" HERE WHICH EXHIBIT CARD IS SHOWN: ( )MM ( )TT

1. **HAND RESPONDENT EXHIBIT CARD. SAY:** This is the name of a frozen meal product that you might see in the frozen food section of a grocery store. Feel free to comment, if you wish, on anything about this. **RECORD ANY SPONTANEOUS COMMENTS MADE.**

_____

_____

_____

( )NO SPONTANEOUS COMMENTS

WHEN RESPONDENT IS DONE LOOKING AT EXHIBIT CARD, TAKE BACK EXHIBIT CARD, AND PUT IT OUT OF SIGHT FOR THE REMAINDER OF THE INTERVIEW.

2a. Based on what you just saw, who or what company do you believe makes the frozen meal product with the name that I showed you OR do you not have a belief?

( )DON'T HAVE A BELIEF…**SKIP TO Q.3a.**

b. What makes you say that <INSERT RESPONSE GIVEN IN Q.2a> makes the frozen meal product with the name that I showed you? **PROBE**: Anything else?

3a. What other products or brands, if any, do you believe come from the same company who makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE**: Any others?

( )DON'T HAVE A BELIEF…**SKIP TO Q.4a.**

b. **ASK FOR EACH PRODUCT OR BRAND GIVEN IN Q.3a**: What makes you say that <INSERT RESPONSE GIVEN IN Q.3a> comes from whoever makes the frozen meal product with the name that I showed you? **PROBE**: Anything else?

a. What Product or Brand?	b. What Makes You Say That?

4a. What other brand or company, if any, do you believe is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you OR do you not have a belief? **PROBE**: Any others?

( )DON'T HAVE A BELIEF…**SKIP TO "CLASSIFICATION PAGE."**

b. **ASK FOR EACH BRAND OR COMPANY GIVEN IN Q.4a**: What makes you say that <INSERT RESPONSE GIVEN IN Q.4a> is related to, associated with, or has a licensing agreement with whoever makes the frozen meal product with the name that I showed you? **PROBE**: Anything else?

a. What Brand or Company?	b. What Makes You Say That?
_____	_____
	_____
	_____
_____	_____
	_____
	_____
_____	_____
	_____
	_____

CLASSIFICATION PAGE

In order to be counted as a complete survey, I need to have a phone number where you can be reached if a verifier calls to confirm that you participated in the study. May I please have a phone number where you can be reached? This verification call would take less than a minute of your time.

Is this your ( )HOME ( )BUSINESS or ( )CELL phone? Thank you.

NAME:_____PHONE:_____

ADDRESS:_____CITY/STATE:_____

ZIP CODE:_____INTERVIEWER:_____DATE:_____

FIELD SERVICE:_____MALL:_____

INTERVIEWER CERTIFICATION

This certifies I have personally conducted this interview with the above named respondent to the best of my ability and in compliance with the interviewing instructions. I have recorded, as fully as possible, the respondent's complete answers to the above questions.

SIGNATURE OF INTERVIEWER:_____

PRINTED NAME OF INTERVIEWER:_____

INTERVIEWING INSTRUCTIONS

Survey Center
Marketing Research

FROZEN FOOD STUDY

INTERVIEWING INSTRUCTIONS

March 2012

Each interviewer working on this job must be briefed by a supervisor. The briefing must consist of having these instructions read in their entirety. The supervisor must then witness each interviewer conducting a practice run-through on the questionnaire.

MATERIALS:

- 104 Hard Copy Screeners
- Terminate Tally Sheet
- Exhibit Cards:
  - Exhibit Card MM
  - Exhibit Card TT

SCREENING CRITERIA

- Respondent must be 18 years of age and older.
- Respondent must be personally responsible for "all" or "some" of the grocery shopping in their household.
- Respondent must have either personally purchased frozen meals in the past month or must plan to personally purchase frozen meals in the next month.
- Respondent must not have participated in any market research survey in the past three months.
- Respondent, or any member of his/her household, must not work for a market research or advertising firm; a manufacturer, distributor or retailer of frozen food; or a store in the mall.
- Respondent must be wearing his/her eyeglasses or contact lenses if he/she usually wears them while shopping or reading.

QUOTA

- Your quota is **52** completed interviews divided evenly by exhibit card as shown below.

	Total 52
Exhibit MM	26
Exhibit TT	26

- Each respondent sees only one Exhibit Card during the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent's sight during the interview. The exhibit card shown is rotated between respondents.
- There are no hard age/gender quotas in this study. You must screen respondents according to the screening quotas shown below.
- If you have not reached your quota of 52 completed interviews after 104 screened respondents, continue screening by age group and gender in the proportion shown below.
- Your **screening quota** DIVIDES BY Age Group and Gender as follows:

	SCREENING NUMBERS
18-34 Male	15
18-34 Female	15
35-54 Male	20
35-54 Female	20
55+ Male	17
55+ Female	17
TOTAL	**104**

- No interviewer should complete more than 8 completed interviews using Exhibit Card MM or 8 completed interviews using Exhibit Card TT.

GENERAL INTERVIEWING INSTRUCTIONS

- Respondents may be screened on the mall floor, but must be interviewed in a private room in the interviewing facility.
- Interviewer must use the N^{th} systematic sampling process to determine which respondent to approach. Interviewer should count the number of people that walks past him/her within a 30-second time frame. Take the number of people and divide by two; this quotient will be your N^{th} select record. Interviewer must approach and screen every N^{th} visitor.
- Upon reaching the screening site, screen each person, regardless of race, dress, appearance, or any other consideration, who appears to meet the quota requirements. Once a qualified respondent has been interviewed, repeat the screening process described above to locate the next qualified respondent.
- Interview only one respondent in a group.
- Interview only one respondent at a time.
- No respondent may be present while another respondent is being interviewed.
- Do not interview respondents who do not understand English.
- Do not interview respondents who have difficulty hearing.
- Do not interview anyone who you know personally.
- There is no smoking, eating, or gum chewing allowed while interviewing.
- Follow all instructions on the questionnaire.
- Read all questions and record all responses verbatim. No paraphrasing is allowed. Be sure to record every word of a response exactly the way it is spoken.
- Probe and clarify where indicated for a complete response.
- If a respondent does not hear or understand a question, simply repeat it.
- Complete the questionnaire on a computer using the website link we have provided.
- Each interviewer's work will be independently validated. Attempt to secure a name and phone number from every respondent.
- Interviewer must type his/her full name in the space indicated for the interviewer certification. No interviews will be accepted that are not certified.
- Ask the respondent to put on eyeglasses if he/she usually wears them while shopping or reading. If he/she wears eyeglasses or contact lenses when shopping or reading but doesn't have them with him/her at the time of the interview or refuses to put them on, the interview must be terminated.

SPECIFIC INTERVIEWING INSTRUCTIONS

- Escort respondent to interviewing facility. Ask respondent to put on his/her eyeglasses or contact lenses if he/she normally wears them while shopping or reading.

- Each respondent sees only one exhibit card during the course of the interview: either Exhibit Card MM or Exhibit Card TT. The other exhibit card not being shown must be out of respondent's sight during the interview.

- Rotate which exhibit card is shown between respondents and record in survey.

- In Question 1, hand respondent the exhibit card and allow him/her to look at it for as long as he/she would like. Record any spontaneous comments the respondent makes. When respondent is done looking at exhibit card, take back exhibit card, and put it out of sight for the remainder of the interview. Respondent should not refer to exhibit card when answering subsequent questions.

- Ask Question 2a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 2a, then skip to Question 3a.

- If respondent names a company in response to Question 2a, continue with Question 2b. Probe and clarify for a complete response.

- Ask Question 3a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 3a, then skip to Question 4a.

- If respondent names a product or brand in response to Question 3a, continue with Question 3b. Probe and clarify for a complete response.

- Ask Question 3b for each product or brand respondent gives in Question 3a.

- Ask Question 4a of all respondents.

- If respondent says "Don't Have A Belief" in response to Question 4a, then skip to "Classification Page."

- If respondent names a brand or company in response to Question 4a, continue with Question 4b. Probe and clarify for a complete response.

- Ask Question 4b for each brand or company respondent gives in Question 4a.

- Secure classification information and thank respondent for participating.

EXHIBITS

SMART BALANCE

RIGHT BALANCE

APPENDIX C

- Validation Summary

LJS STRATEGIC RESEARCH
LEO J. SHAPIRO & ASSOCIATES L.L.C.

Frozen Foods Study
Validation Summary

Total # of Respondents:	414
Attempted/Reached:	227
Valid:	223
Invalid:	4
Attempted/Not Reached:	187

The Bates ID Numbers for the invalid respondents are as follows: #23, #42, #333, and #311.

APPENDIX D

- Verbatim from Respondents Who Identify Weight Watchers

Verbatim From Respondents
Who Identify Weight Watchers

Total "Weight Watchers" Identification in Test Cell	**n = 13**	**6%**
- In Source Question	n = 6	3%
- In Related Products/Brands, But Not Source Question	n = 1	*
- In Relationship, But Not Source or Related Products/Brands Questions	n = 6	3%

Total "Weight Watchers" Identification in Control Cell	**n = 14**	**7%**
- In Source Question	n = 10	5%
- In Related Products/Brands, But Not Source Question	n = 2	1%
- In Relationship, But Not Source or Related Products/Brands Questions	n = 2	1%

* 0.5% or fewer mentions.

Total "Weight Watchers" Identification in Test Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00015

Q2a.	Weight Watchers
Q2b.	Because it just seems like what their logo would be. It just sounds healthy.

ID 00122

Q2a.	Weight Watchers
Q2b.	Because it makes me think of weight loss and a smarter way of eating.

ID 00170

Q2a.	Weight Watchers
Q2b.	It looks like something they would make.

ID 00193

Q2a.	Weight Watchers
Q2b.	Sounds like a Weight Watchers product.

ID 00331

Q2a.	Weight Watchers
Q2b.	Looks like their packaging.

ID 00346

Q2a.	Weight Watchers
Q2b.	Because the words "smart" and "balance" make you think of healthy foods.
Q4a1.	Weight Watchers
Q4b1.	Because they are very predominant within the smart and healthy diet plans.

Related Products Question

ID 00324

Q3a1.	South Beach Diet
Q3b1.	They are also focused on healthy options.
Q3a2.	Weight Watchers
Q3b2.	They too are focused on healthy alternatives.

Relationship Question

ID 00016

Q4a1.	Kashi
Q4b1.	They typically deal with stuff involving health foods.
Q4a2.	Weight Watchers
Q4b2.	It sounded like they would be involved with health as well.

ID 00087

Q4a1.	Weight Watchers
Q4b1.	They are similar brands.

ID 00174

Q4a1.	Weight Watchers
Q4b1.	Because it said "balance."
Q4a2.	Swanson
Q4b2.	Don't Know/Not Answering

ID 00185

Q4a1.	Weight Watchers
Q4b1.	Because both products are related to diet and exercise.

ID 00268

Q4a1.	Jenny Craig
Q4b1.	Just because of the "smart" and the "balance" and this program tends to have the nutrition and balance that you need.
Q4a2.	Weight Watchers
Q4b2.	Because they really seem to be about "smart" and "balanced" choices with their approach to a person's eating.

ID 00412

Q4a1.	Weight Watchers
Q4b1.	Because Smart Balance is nutritional and Weight Watchers is in that same line.

Total "Weight Watchers" Identification in Control Cell

- Source Question
- Related Products Question
- Relationship Question

Source Question

ID 00075

Q2a.	Weight Watchers
Q2b.	The names are similar and I know they have other products that are healthy.

ID 00094

Q2a.	Weight Watchers
Q2b.	The name implies balanced nutrition.

ID 00139

Q2a.	Weight Watchers
Q2b.	I've seen them with a name like that. Also I associate it with healthy eating.

ID 00167

Q2a.	Weight Watchers
Q2b.	Because the emphasis is on a balanced menu.

ID 00205

Q2a.	Weight Watchers
Q2b.	I thought that they made a calorie system where you have certain points for the day reminding you of the calories you take in.

ID 00208

Q2a.	Weight Watchers
Q2b.	Because they are concerned about weight and nutrition. It sounds like it has the right calories and nutrition needed.
Q3a1.	Weight Watchers
Q3b1.	Because they are concerned about nutrition and would try to get the proper balance of proteins and nutrients.

ID 00308

Q2a.	Weight Watchers
Q2b.	Because it is saying Right Balance so it has to do with balancing your meals.

ID 00310

Q2a.	Weight Watchers
Q2b.	Because it sounds like something they make.

ID 00318

Q2a.	Weight Watchers
Q2b.	It sounds like something they would make.

ID 00367

Q2a.	Weight Watchers
Q2b.	Because they want you to eat healthy.

Related Products Question

ID 0095

Q3a1.	Weight Watchers
Q3b1.	Looks like healthy food.

ID 00381

Q3a1.	Lean Cuisine
Q3b1.	They are all associated with healthy foods.
Q3a2.	Weight Watchers
Q3b2.	They make healthy products.

Relationship Question

ID 00103

Q4a1.	Weight Watchers
Q4b1.	I know Weight Watchers is in the frozen food section.

ID 00376

Q4a1.	Weight Watchers
Q4b1.	It just sounds like something that is related to Weight Watchers.

EXHIBIT 3

2001 WL 1587072 (Trademark Tr. & App. Bd.)

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

Trademark Trial and Appeal Board
Patent and Trademark Office (P.T.O.)

ITOTE INC.
v.
TOTES ISOTONER CORP.

Opposition No. 121,054

December 7, 2001

Before Quinn, Walters and Wendel
Administrative Trademark Judges.

By the Board.

Totes Isotoner Corporation ("applicant") seeks to register the mark TOTES for "backpacks, day packs, belt bags, all purpose sports bags, duffle bags, [and] briefcases" in International Class 18.[FN1]

Registration has been opposed by iTote Inc. ("opposer") on the grounds that the involved mark, when applied to applicant's goods, is generic.

This case now comes up for consideration of
(a) applicant's motion to dismiss (filed January 29, 2001);
(b) applicant's motion for summary judgment (filed January 30, 2001);
(c) opposer's motion to reopen its time to respond to applicant's motion to dismiss (filed February 24, 2001);
(d) opposer's cross-motion for summary judgment (filed February 24, 2001);
(e) applicant's motion to strike opposer's response to its motion to dismiss as untimely and filed by the incorrect party (filed May 17, 2001);
(f) applicant's motion that the Board not consider opposer's filing of April 24, 2001 of unauthorized sur-replies (filed May 17, 2001); and
(g) opposer's motion for additional time to respond to applicant's future motions (filed July 23, 2001).
The motions are fully briefed.

Preliminarily, we will address applicant's motion, filed May 17, 2001, that the Board not consider opposer's April 24, 2001 filing since it is a sur-reply, and opposer's motion, filed July 23, 2001, for additional time to respond to applicant's future motions.

Applicant's Motion Regarding Opposer's Sur-replies
We consider applicant's motion first. Applicant requests that the Board give no consideration to opposer's sur-replies and

supplemental authority filed April 24, 2001 with the Board. In support of its motion, applicant argues that the combined 38 page paper filed by opposer contains sur-replies to applicant's motion to dismiss and motion for summary judgment as well as supplemental authority for opposer's cross motion for summary judgment; and that the filings are in violation of Trademark Rule 2.127, which limits reply briefs to ten pages or less and provides that "after a reply is filed "[n]o further papers in support of or in opposition to a motion will be considered by the Board". Applicant further requests that if the Board considers the paper filed by opposer on April 24, 2001, that it have the opportunity to address the "misstatements and mischaracterizations of the law, as well as respond to serious allegations raised by iTote Inc. of improper conduct by totes and its counsel."

In response, opposer argues that "it is duplicitous of applicant to insist the rules be applied with absolute stringent-ness to opposer, but that applicant should be held above the rules and have a right to reply"; that applicant is attempting to "cloud legitimately filed responses and dismiss them summarily"; and that applicant's argument regarding the page limit of its reply memoranda is groundless since "each part, titled individually, and taken separately is less than 10 pages."

*2 We agree with applicant that Trademark Rule 2.127(a) does not provide for sur-replies or the filing of supplemental briefs. While the Board in its discretion may consider a sur-reply or supplemental brief, here, opposer has filed sur-replies and supplemental brief without leave of the Board. Accordingly, opposer's filing of April 24, 2001, containing sur-replies and supplemental authority has been given no consideration in deciding the motions presented by the parties. Even if considered, however, we would reach the same result on the matters raised herein.

Opposer's Motion Requesting Additional Response Time

We turn next to opposer's motion, filed July 23, 2001, that the Board allow opposer additional response time beyond that provided by Trademark Rule 2.127(a) to respond to future motions of applicant.

In support of its motion, opposer argues that it is "not supported by a staff of 27 attorney's [sic]"; and that it needs an additional 15 days beyond those provided by Trademark Rule 2.127(a) for "proper and sufficient research to support a response" to the "memorandums" of applicant.

Although applicant has not responded specifically thereto,[FN2] we will not grant opposer's motion as conceded but will consider opposer's motion on its merits.

We first note that opposer is proceeding pro se through its managing director in this case before the Board. Nonetheless, opposer is advised that pro se parties are not entitled to any special treatment by the Board and strict **compliance** with the Trademark **Rules** and all other applicable **rules** is expected of all parties, even those representing themselves. It is the responsibility of a party, even those parties representing themselves, to timely review and respond to motions filed by opposing counsel, to keep track of filing **deadlines**, and to take steps to secure a timely extension of those **deadlines**. Opposer is advised that noncompliance with the Board **Rules** of Practice will be looked on with extreme disfavor by the Board.

Accordingly, opposer's motion for additional time beyond that provided by Trademark Rule 2.127(a) to respond to applicant's future motions is denied.

Opposer's Motion to Reopen

Turning next to opposer's motion to reopen, we note that in this case, opposer has failed to timely respond to applicant's motion to dismiss as a result of its belief that the time to respond was based on "business days" rather than actual days. While opposer's ignorance or misunderstanding of the **Rules** of Practice governing Board proceedings does not excuse opposer from **complying** with the **deadlines** set by the Board or imposed by the **Rules**, we will exercise our discretion, and rather than treat applicant's motion to dismiss as conceded, we will consider opposer's untimely response herein. See Trademark **Rule** 2.127(a); and TBMP Section 502.03.

Applicant's Motion to Dismiss

We now turn to applicant's motion to dismiss on the ground that opposer iTote Inc. (hereinafter "iTote"), did not timely file this

opposition.

*3 In support of its motion, applicant indicates that extensions of time to file an opposition against application Serial No. 75/714,429 were granted by the Office to Adam Bennett, an individual; that the notice of opposition filed against application Serial No. 75/714,429 was filed in the name of iTote, a California S corporation; that the opposition must be dismissed on the grounds that opposer iTote did not file a notice of opposition within thirty days of publication of the mark or request an extension of time to oppose; that there is no evidence that opposer iTote is in privity with Adam Bennett nor does Mr. Bennett's status as iTote's managing director establish privity; and that there is no evidence that iTote has been misidentified as the party opposer by mistake.

In response, Adam Bennett argues that he is the "incorporator, fiduciary, CEO and the sole shareholder of iTote, a closely held California corporation"; that as sole shareholder, Adam Bennett has "nearly identical commercial interests with iTote"; that privity exists because iTote is closely held and operated by and for the interests of one person, Adam Bennett; that there is no need to show privity since Adam Bennett was the signatory for the opposition; and that the Board should either find privity between Mr. Bennett and iTote or allow Adam Bennett to be substituted for iTote as party opposer.

In reply, applicant argues that opposer's response should not be considered because it was filed in the name of Adam Bennett, and not in the name of opposer iTote;[FN3] that its motion to dismiss should be granted because Mr. Bennett presents no evidence that he is in privity with opposer iTote; and that Mr. Bennett does not deny that the notice of opposition was intentionally filed in the name of iTote Inc.

We find that Adam Bennett is in privity with iTote.

An extension of time to oppose inures to the benefit of the potential opposer and its privies, so that a party in privity with a potential opposer may step into the potential opposer's shoes and file a notice of opposition or may join with the potential opposer as a joint opposer. See Trademark Rule 2.102(b) and *In re Cooper*, 209 USPQ 670 (Comm'r Pat. 1980). Parties in privity must have the same right or interest. See TMEP Section 1503.04(d); *In re Spang Industries, Inc.* 225 USPQ 888 (Comm'r Pats. 1985).

Here, Mr. Bennett indicates in its response to applicant's motion to dismiss that he is the sole shareholder of iTote and has legal and financial interests identical to iTote. From the information provided by Mr. Bennett, it appears that iTote is acting in privity with Mr. Bennett. *See Missouri Silver Pages Directory Publishing Corp. Inc. v. Southeastern Bell Media, Inc.* 6 USPQ2d 1028, 1032 (TTAB 1988); *cf. Raker Paint Factory v. United Lacquer MFG. Corp.* 141 USPQ 407 (TTAB 1964). Accordingly, inasmuch as Adam Bennett is in privity with opposer iTote, applicant's motion to dismiss on the ground that the notice of opposition was untimely filed is denied.[FN4]

The Summary Judgment Motions

*4 We now turn to the parties' cross motions for summary judgment, each on different grounds. The Board has carefully considered the arguments and exhibits of each party with regard to the motions for summary judgment.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). A factual dispute is genuine, if, on the evidence of record, a reasonable finder of fact could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992), and *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The evidence must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993), and *Opryland USA, supra.*

We consider opposer's motion for summary judgment first.

Opposer moves for summary judgment on the grounds that there is no genuine issue that the mark TOTES in the involved application is generic; that applicant has improperly used the registration notice with the goods associated with its unregistered TOTES mark; and that applicant had an intent to deceive the Office by omitting the word "'tote' bag" from the identification of goods in application Serial No. 75/714,429 but had "every intention of selling generically named products subsequent to registration."[FN5]

Opposer has failed to meet its burden of proof in connection with its cross motion for summary judgment. We find that genuine issues of material fact exist, at a minimum, regarding whether the primary significance of the term TOTES is as a generic designation for the goods identified in the involved application in this proceeding. Accordingly, opposer's motion for summary judgment is denied.

Turning next to applicant's motion for summary judgment, applicant argues that summary judgment is appropriate because applicant owns numerous existing registrations of the TOTES mark (alone or in combination with other words) for the identical or substantially identical goods as those in the involved application of this proceeding, and that as a result, there is no ground for sustaining the opposition since opposer cannot be damaged within the meaning of Section 13 of the Lanham Act, 15 U.S.C. Section 1063.

***5** We find that applicant's motion for summary judgment is not well taken.

The prior registration defense, also known as the "Morehouse defense," is an equitable defense in the nature of laches, estoppel or acquiescence. Like other equitable defenses, the Morehouse defense is not applicable in cases of descriptiveness or genericness. *See United States Olympic Committee v. O-M Bread Inc.* 29 USPQ2d 1555, 1558 (TTAB 1993); *TBC Corp. v. Grand Prix Ltd.*, 12 USPQ2d 1311 (TTAB 1989); *Bausch & Lomb Inc. v. Leupold & Stevens Inc.*, 1 USPQ2d 1497 (TTAB 1986).

Accordingly, we must deny applicant's motion for summary judgment.

In view of the denial of the parties' motions for summary judgment and applicant's motion to dismiss, proceedings herein are resumed and applicant is allowed until **thirty days** from the mailing date of this order to file an answer to the notice of opposition.

Discovery and trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**May 15, 2002**
Testimony period for party in position of plaintiff to close: (opening thirty days prior thereto)	**August 13, 2002**
Testimony period for party in position of defendant to close: (opening thirty days prior thereto)	**October 12, 2002**
Rebuttal testimony period to close: (opening fifteen days prior thereto)	**November 26, 2002**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

FN1. Application Serial No. 75/714,429, filed on May 26, 1999, based on an allegation of a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. Section 1051(b), amendment to allege use filed on January 24, 2000, alleging use in commerce since 1981.

FN2. Opposer's request was made in opposer's reply to its cross motion for summary judgment, and the Trademark Rules do not provide for a sur-reply by applicant. See Trademark Rule 2.127(a).

FN3. Applicant's request is not well taken in that Adam Bennett as an officer of iTote is entitled to represent iTote and file responses on its behalf. See TBMP Section 114.01. Accordingly, applicant's request that the Board not consider Adam Bennett's responses to the motion to dismiss on the basis that the response has not been filed by the appropriate party is denied. We also deny applicant's similar request with regard to Adam Bennett's response to applicant's motion for summary judgment.

FN4. We see no need to substitute Mr. Bennett for the party opposer, iTote.

FN5. We find that only one ground-genericness-has been properly asserted in the notice of opposition. To the extent that opposer seeks summary judgment on the grounds of misuse of the registration symbol and intent to deceive (i.e., fraud) said motions are denied. A party may not obtain summary judgment on an issue which has not been pleaded. See Fed. R. Civ. P. 56; TBMP Section 528.07(a), citing Paramount *Pictures Corp. v. White*, 31 USPQ2d 1768 (TTAB 1994).

2001 WL 1587072 (Trademark Tr. & App. Bd.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by ordinary U.S. mail, postage prepaid, with a courtesy copy via email, on this 3rd day of May, 2012, to Counsel for Applicant:

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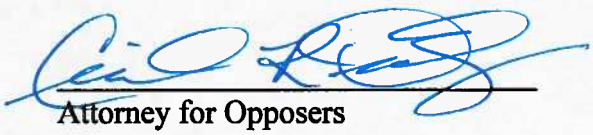

Attorney for Opposers